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No. 05-908

Supreme Court, U.S.
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In the

Supreme Court of the United States

PARENTS INVOLVED IN COMMUNITY SCHOOLS,
Petitioner,

v.

SEATTLE SCHOOL DISTRICT NO. 1, et al.,
Respondents.

On Writ of Certiorari to United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, AMERICAN CIVIL RIGHTS INSTITUTE, CENTER FOR EQUAL OPPORTUNITY, AMERICAN CIVIL RIGHTS UNION, AND NATIONAL ASSOCIATION OF NEIGHBORHOOD SCHOOLS IN SUPPORT OF PETITIONER

PAUL J. BEARD II
Of Counsel
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

SHARON L. BROWNE
Counsel of Record
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Counsel for Amici Curiae
Pacific Legal Foundation, American Civil Rights Institute, Center for Equal Opportunity, American Civil Rights Union, and National Association of Neighborhood Schools

QUESTIONS PRESENTED

1. Whether the rationale for promoting student body viewpoint diversity in institutions of higher education, as discussed in *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Gratz v. Bollinger*, 539 U.S. 244 (2003), should be limited to that context and not extended to elementary and secondary public schools.

2. Whether the interest in racial diversity otherwise provides a compelling interest that can justify the use of race in selecting students for admission to public high schools?

3. May a school district that is not *de jure* segregated and that normally permits a student to attend any high school of her choosing, deny a child admission to her chosen school solely because of her race in an effort to achieve a desired racial balance in particular schools, or does such racial balancing violate the Equal Protection Clause of the Fourteenth Amendment?

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IDENTITY AND INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.3(a), Pacific Legal Foundation (PLF), the American Civil Rights Institute (ACRI), Center for Equal Opportunity (CEO), the American Civil Rights Union (ACRU), and the National Association of Neighborhood Schools (NANS) submit this amicus curiae brief in support of Petitioner Parents Involved in Community Schools.[1] The parties have lodged universal letters of consent with the Clerk of this Court for the filing of briefs amicus curiae.

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF has extensive litigation experience in the area of group-based preferences and civil rights. PLF has participated as amicus curiae in numerous cases relevant to the analysis of this case, including *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1 (1st Cir.), *cert. denied*, 126 S. Ct. 798 (2005); *Johnson v. California*, 543 U.S. 499 (2005); *Gratz v. Bollinger*, 539 U.S. 244 (2003), *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); and *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

ACRI and CEO are nonprofit research, education, and public advocacy organizations. Amici devote significant time and resources to the study of racial, ethnic, and gender discrimination by the federal government, the several states, and private entities. They educate the American public about the prevalence of discrimination in American society. Amici publicly advocate the cessation of racial, ethnic, and gender discrimination by the federal government, the several states, and

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[1] Pursuant to Rule 37.6, amici curiae affirm that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

private entities. They have participated as amici curiae in numerous cases relevant to the analysis of this case.

ACRU is a nonprofit organization that supports and defends all the rights guaranteed in the United States Constitution. ACRU maintains that both basic morality and the Constitution require that all Americans be treated equally under the law regardless of race or national origin.

NANS is a national association comprised of individuals and groups of all races and nationalities whose goal is to restore the neighborhood-school concept by fighting to prevent government officials from issuing orders requiring the use of race and ethnicity to limit school choice.

Amici PLF, ACRI, CEO, and ACRU participated as amici curiae in this case before the Ninth Circuit Court of Appeals. Moreover, PLF, ACRI, and CEO are participating as amici curiae in *Meredith v. Jefferson County Bd. of Educ.*, 126 S. Ct. 2351 (2006).

SUMMARY OF ARGUMENT

The Ninth Circuit issued an *en banc* decision holding that noncompetitive elementary and secondary public schools may use race as a factor in assigning students to public schools to achieve the supposed educational and social benefits of racially balanced schools. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1*, 426 F.3d 1162 (9th Cir. 2005), *cert. granted*, 126 S. Ct. 2351 (2006) (*PICS*). By doing so, the Ninth Circuit unjustifiably extended the holding and rationale in *Grutter*—which dealt specifically with competitive law school admissions—to the noncompetitive world of compulsory K-12 public education. The wrong message is being sent to our children: A child's race is more important than equal protection of the laws, and the racial makeup of a student's school determines his or her academic success.

The extraordinary deference this Court accorded the judgment of officials of the University of Michigan springs from their unique First Amendment right to academic freedom and is not available to locally elected school boards. Deference also is inappropriate because board members are susceptible to improper influences of racial politics. This Court in both *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), and *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986), refused to defer to elected local bodies. The Equal Protection Clause cannot take a backseat to the discretion of elected local school boards.

Moreover, this Court has never recognized racial balancing in K-12 public schools as a compelling state interest. Racial balance in K-12 is based on the notion that a child's skin color (or the skin color of his or her classmates) determines how that child thinks, behaves, and performs academically. *Grutter*'s acceptance of a genuine diversity interest has no counterpart in K-12 public schools and should be limited to higher education. Unlike universities where students choose to apply, K-12 students have a right to admission; indeed K-12 students *must* attend school. Public universities have expansive freedoms of speech whereas the education mission of K-12 public education is to teach fundamental values, including the principle of nondiscrimination and the lesson that we are not defined by skin color.

Furthermore, this Court should not rely on disputed social science research to support a claim that racial balancing is a compelling interest. Social science research frequently rests on uncertain footing. Its use by state schools in *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954), *Grutter*, and *Gratz* was improper, because such research can be revised or repudiated. Using social science research to support racial discrimination also opens the floodgates to creating exceptions to the Equal Protection Clause. Its use must be cabined here or there will be no end to the creativity with which such claims are made.

Finally, the racial balancing of K-12 public schools cannot meet this Court's narrow tailoring requirements. Race is used mechanically and in the nonindividualized manner rejected in *Grutter* and *Gratz*. K-12 administrators simply cannot perform the holistic review that *Grutter* found essential to a narrowly tailored race-conscious policy. Public schools also should be required to prove that race-neutral alternatives for achieving educational benefits have failed before resorting to racial discrimination. Those race-neutral alternatives have been shown to exist and to work in practice.

ARGUMENT

I

DEFERENCE TO ELECTED LOCAL SCHOOL BOARDS ON THE USE OF RACE IS INCOMPATIBLE WITH THE EQUAL PROTECTION CLAUSE

All racial classifications are subject to strict scrutiny review: Government has the burden of proving that the racial classification is narrowly tailored to further a compelling state interest. *Johnson*, 543 U.S. at 505. In this case, the lower court improperly accorded deference to an elected local school board's policy in upholding its high school racial balancing plan. In applying strict scrutiny to the plan, the majority chose a pragmatic application of *Grutter*'s deferential standard rather than a straightforward application of the strict scrutiny standard. Deferring to elected local school boards engaged in race-based classification and assignment of students, however, is fundamentally incompatible with this Court's Equal Protection jurisprudence. "The undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing a State's social and economic legislation." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973); *Goss v. Lopez*, 419 U.S. 565, 574 (1975) (the "Fourteenth

Amendment . . . protects the citizen against the State itself and all of its creatures—Boards of Education not excepted").

The Equal Protection Clause mandates that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

> Because the Fourteenth Amendment 'protect[s] *persons* not *groups*,' all governmental action based on race—a *group* classification long recognized as in most circumstances irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed.

Grutter, 539 U.S. at 326 (quoting *Adarand*, 515 U.S. at 227) (internal quotation marks and citations omitted); *see also Loving v. Virginia*, 388 U.S. 1, 10 (1967) ("The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States.").

In *Adarand*, this Court reiterated that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Adarand*, 515 U.S. at 214 (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). This Court stated that free people "should tolerate no retreat from the principle that government may treat people differently because of their race only for the most compelling reasons." *Adarand*, 515 U.S. at 227. This intolerance is necessary because government racial discrimination of any sort is inherently suspect, and so racial characteristics are almost never an appropriate consideration for the government. *Id.* at 216.

> [T]he central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating

> from official sources in the States. This strong policy renders racial classifications "constitutionally suspect," and subject to the "most rigid scrutiny" and "in most circumstances irrelevant" to any constitutionally acceptable legislative purpose.

Id. (citations omitted). This includes so-called neutral policies that burden or benefit the races equally. *Shaw v. Hunt*, 517 U.S. 899, 907 (1996); *see also Loving*, 388 U.S. at 8 (rejecting the argument that a miscegenation statute did not discriminate because it "punish[ed] equally both the white and the Negro participants in an interracial marriage"). Indeed, this Court rejected the notion that separate can ever be equal—or "neutral"—in *Brown*, 347 U.S. at 495, and refused to resurrect it in *Johnson*, 543 U.S. at 500. Therefore, "any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny." *Adarand*, 515 U.S. at 224.

For race-based educational policies "[t]o withstand our strict scrutiny analysis, respondents must demonstrate that the[ir] use of race in [their] current admission program employs 'narrowly tailored measures that further compelling governmental interests.' " *Gratz*, 539 U.S. at 270. The lower court's deference to local elected officials is antithetical to strict scrutiny's requirement of "the most searching judicial inquiry." *Adarand*, 515 U.S. at 236.

Grutter did not overturn this doctrine, but rather carved out a very narrow exception. In *Grutter*, this Court accorded extraordinary deference to the determination by officials of the university that genuine diversity was essential to its educational mission. *Grutter*, 539 U.S. at 328-29. This deference springs from the university's unique First Amendment interests. 539 U.S. at 329. The "proper institutional mission" is stated in terms of academic discussion grounded on the First

Amendment.[2] This First Amendment deference would not be granted to any other government agency. *See, e.g., Johnson*, 543 U.S. at 512 (this Court refused to accord deference to state prison officials on race "where those officials traditionally exercise substantial discretion"). The law school's First Amendment right is not part of the education mission of K-12 public schools. Instead, K-12 education is inculcation, not exposure. Kevin G. Welner, *Locking Up the Marketplace of Ideas and Locking Out School Reform: Courts' Imprudent Treatment of Controversial Teaching in America's Public Schools*, 50 UCLA L. Rev. 959, 965 (2003).

Further, elected school boards, like elected city councils, are inherently political and buffeted by the pressures of "racial politics." Tom Campbell, *Separation of Powers in Practice* 122 (2004) ("Racial politics is not only helping one's race, it's using race to curry votes."). In *Croson*, this Court invalidated an elected local city council's voluntary race-based preference program, fearing that it was adopted for the purpose of "racial politics"—a concept that applies equally to local school boards. This Court demanded that any government entity seeking to classify by race must point to specific identified instances of past or present discrimination.

> [I]f there is no duty to attempt either to measure the recovery by the wrong or to distribute that recovery within the injured class in an evenhanded way, our

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[2] This deference to university officials was controversial. The dissents in *Grutter* recognized the danger of according deference to university officials when race classifications are used. Justice Kennedy said that according deferential review "is nothing short of perfunctory" when the Court accepts the law school's "assurances that its admissions process meets with constitutional requirements." *Grutter*, 539 U.S. at 388-89 (Kennedy, J., dissenting). Justice Thomas found this Court's deference to the university to be a total abdication of its duty to strictly scrutinize. *Id.* at 362 (Thomas, J., dissenting).

> history will adequately support a legislative preference for almost any ethnic, religious, or racial group with the political strength to negotiate "a piece of the action" for its members.

Croson, 488 U.S. at 510-11. Race-based decisions made by political groups in the political process are suspect. *Id.* at 496. This Court held:

> Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.

Id. at 493. Justice Scalia concurred in the judgment, arguing that racial classifications must be restricted even more narrowly:

> At least where state or local action is at issue, only a social emergency rising to the level of imminent danger to life and limb—for example, a prison race riot, requiring temporary segregation of inmates—can justify an exception to the principle embodied in the Fourteenth Amendment that "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens."

Id. at 521 (Scalia, J., concurring in judgment) (citations omitted).

The circumstances under which racially discriminatory local legislation or programs may legally be enacted are extremely narrow. The enactment of racially discriminatory programs merely as a part of the political process to better the condition of one racial group is not permitted under the Constitution. *Croson*, 488 U.S. at 495-96. At best, racial balancing of public schools is likely nothing less than a local school board's attempt to remedy general societal discrimination, an interest that has been rejected by this Court. *Wygant*, 476 U.S. at 276 (plurality opinion); *Croson*, 488 U.S. at 496-98 (plurality opinion).

The lower court's deference to Seattle's elected school board is contrary to *Wygant*, 476 U.S. 267. In *Wygant*, this Court did not defer to a local school board's judgment with respect to the purported benefits of a racially mixed teaching staff. There, this Court found unconstitutional a collective-bargaining agreement between a school board and a teacher's union that favored certain minority races. The school board defended the agreement on the grounds that minority teachers provided "role models" for minority students and that a racially "diverse" faculty would improve the education of all students. *Id.* at 275-76. This Court held that the use of race violated the Equal Protection Clause and rejected an asserted interest in "providing minority role models for [a public school system's] minority students, as an attempt to alleviate the effects of societal discrimination." *Id.* at 274. That interest was found to be "too amorphous a basis for imposing a racia[l] classifi[cation]." *Id.* at 276.

For that reason, this Court should not defer to Seattle's elected school board with respect to an educational policy that uses race to discriminate against students in assigning them to public schools. Seattle's purported interest in using race is neither remedial nor necessary to prevent imminent danger of life and limb. It is not only open-ended, it is also entirely free-

floating because it is not tied to any showing of actual racial discrimination and has no logical stopping point.

Deference to an elected local body is inconsistent with the holdings of this Court in *Grutter*, *Adarand*, *Croson*, and *Wygant*. Because the District is an elected political body, it may "be greatly tempted to use race for political advantage if permitted to do so." Campbell, *supra*, at 125. Any watering down of equal protection review will effectively assure that race will always be relevant in American life, and that the "'ultimate' goal of eliminat[ing] entirely from governmental decisionmaking such irrelevant factors as a human being's race' will never be achieved." *Croson*, 488 U.S. at 495 (citations omitted).

II

RACIAL BALANCING IS NOT A COMPELLING INTEREST SUFFICIENT TO JUSTIFY DISCRIMINATING AGAINST STUDENTS IN K-12 PUBLIC SCHOOLS

A. *Grutter* Does Not Countenance Racial Discrimination in K-12 Public Schools

The District discriminates against students on the basis of race in assigning them to high schools. Under its plan, the District attempts to assign each student to his or her first-choice school. *PICS*, 426 F.3d at 1169. But if a high school is oversubscribed, the District assigns students based on four "tiebreakers," one of which gives dispositive weight to race. *Id.* at 1169-70. If a high school has a racially imbalanced student body—i.e., one that differs by more than 15% from the racial makeup of students in the district as a whole—a student whose race helps to alleviate that imbalance is preferred over students of other races. *Id.* According to the District, the use of race to balance its high schools serves two broad interests, which it argues are "compelling" under *Grutter*. Racial balance

produces "educational and social benefits that flow from racial diversity." *Id.* at 1174. Furthermore, it claims, racial balance "avoid[s] the harms resulting from racially concentrated or isolated schools." *Id.* As this Court emphasized in *Grutter*, "[c]ontext matters when reviewing such [race-based] action." *Grutter*, 539 U.S. at 308. *Grutter* does not apply to K-12 public schools. Neither the terms nor the rationale of *Grutter* allows school districts to discriminate against children for the purpose of racially balancing schools.

First, by its own terms, *Grutter*'s holding applies only in the context of public higher education. This Court granted certiorari in *Grutter* to resolve "[w]hether diversity is a compelling interest that can justify the narrowly tailored use of race in selecting applicants for admission to *public universities*." *Grutter*, 539 U.S. at 322 (emphasis added). It later characterized the legal question before it as whether "*in the context of higher education*, a compelling state interest in student body diversity" exists. *Id.* at 328 (emphasis added). In other parts if its decision, the Court reiterated that its focus was "the use of race in the context of public *higher education*," *id.* (emphasis added), and "the use of race to achieve student body diversity in public *higher education*," *id.* at 334 (emphasis added). The Court gave no hint of an intent to reach race-based policies outside public colleges and universities.

The dissenting Justices of the Court similarly viewed the holding as limited to the area of public higher education. In his dissent, Justice Scalia bemoaned the fact that the majority's opinion would spawn needless litigation. The types of legal disputes that Justice Scalia contemplated would arise, however, involved only admissions policies in public colleges and universities. *Grutter*, 539 U.S. at 348-49 (Scalia, J., dissenting). Justice Thomas described the holding as one that upheld "the use of racial discrimination as a tool to advance the Law School's interest in offering a marginally superior education *while maintaining an elite institution*." *Id.* at 356

(Thomas, J., dissenting) (emphasis added). Justice Kennedy's dissent referred to a "*university's* compelling state interest in a diverse student body" and the constitutionality of race classification in the "special context" of admissions to public colleges and universities. *Id.* at 392, 395 (Kennedy, J., dissenting) (emphasis added).

Second, because "context matters," *Grutter*'s rationale, which is university-specific, cannot be expanded to K-12 public education. *Grutter*'s rationale was based on Justice Powell's statement in *Bakke* that "the expansive freedoms of speech and thought associated with the university environment . . . [are] a special niche in our constitutional tradition" residing in the First Amendment. *Grutter*, 539 U.S. at 329 (citing *Bakke*, 438 U.S. at 312 (Powell, J., opinion) (a university's First Amendment right to "[a]cademic freedom," includes "[t]he freedom of a university to make its own judgments as to education" and "the selection of its student body")). Justice Powell in turn based his theory of a university's academic freedom on a concurrence in *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring), and on the majority opinion in *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967), both of which recognized the right of university faculty members to academic freedom. The "academic freedom" rationale has never been extended to K-12 public school administrators, because K-12 does not share the traits of a university environment—i.e., a "marketplace of ideas" where "scholarship" must be allowed to "flourish." *Keyishian*, 385 U.S. at 603.

Further, in *Grutter*, the Court endorsed the law school's stated interest in obtaining the benefits of *viewpoint* diversity—not racial balance for its own sake. The Court made clear that, while it endorsed the law school's interest in obtaining the "educational benefits" of "exposure to widely diverse people, cultures, ideas, and viewpoints," *id.* at 330, it did not endorse an interest in "simply '[assuring] within its

student body some specified percentage of a particular group merely because of its race or ethnic origin,' " *id.* at 329-30 (quoting *Bakke*, 438 U.S. at 307 (Powell, J., concurring)). In the Court's view, a race-based policy justified on the latter grounds would amount to nothing more than "racial balancing" and would be "patently unconstitutional." *Id.* at 330.

In contrast to universities, K-12 public schools enjoy no "special niche" in constitutional jurisprudence, and their educational mission is not centered on "the robust exchange of ideas." *Id.* at 324. Students have the right–indeed, the obligation–to attend high school. *Goss*, 419 U.S. at 574. And the educational mission of K-12 public schools is to teach and inculcate, not to debate diverse viewpoints. *See, e.g., Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) (observing that the purpose of American public schools is to teach fundamental values necessary to maintain a democratic system); *see also* Welner, *supra*, at 965 (arguing that public school education "is inculcation, not exposure"). K-12 public schools prepare students for citizenship, which includes teaching the principle of equal protection enshrined in our Constitution. *Bethel*, 478 U.S. at 681. Such instruction necessarily includes less emphasis on the "robust exchange of ideas" in elementary and secondary school education. Joint Statement of Constitutional Law Scholars, The Civil Rights Project at Harvard University, *Reaffirming Diversity: A Legal Analysis of the University of Michigan Affirmative Action Cases* 23 (2003).

Finally, racial balance cannot be a compelling state interest in K-12 public schools, because it is unnecessary to their successful operation. Even in the university context, students excel—and often perform better academically—in racially homogeneous environments. *E.g., Grutter*, 539 U.S. at 364-65 (Thomas, J., dissent) (citing evidence that black students at historically black colleges—where 1-2% of the student body is nonblack—outperform those at predominantly white colleges).

If racial diversity, along with the alleged diversity of viewpoints that accompany it, do not impact academic performance in colleges and universities, there is no reason to believe racial balance affects children's performance in K-12 public schools, particularly where the achievement of viewpoint diversity is unimportant to the educational mission.

The District's assignment plan is simply a mechanism for racial balancing where the school district demands nothing more than proportional representation by pigmentation to achieve its preferred racial mix of white and nonwhite students. Such racial balancing is "patently unconstitutional." *Grutter*, 539 U.S. at 330.

B. Permitting K-12 Public Schools to Discriminate on the Basis of Race in School Assignments Is Not Sanctioned by Any Supreme Court Precedent Before or After *Grutter*

At bottom, the District seeks to justify its race-balancing scheme on the ground that racial diversity achieves certain societal benefits and remedies societal ills. For example, the District claims that racial balance will, among other things, improve race relations, reduce prejudice, and create opportunity networks in higher education and employment. *PICS*, 426 F.3d at 1174-77. By the same token, the District claims that racial balance prevents the societal ills that plague racially isolated schools, which are "characterized" by high levels of poverty, low levels of student achievement, low-quality teachers, and fewer advanced courses. *Id.* at 1177-79. These reasons for discriminating against children in K-12 public schools have never been given credence by any decision of this Court, either before or after *Grutter*.

In *Wygant*, this Court rejected calls to recognize as "compelling" an interest in obtaining the alleged benefits of a racially diverse faculty in K-12 public schools. *Wygant*, 476

U.S. 267, involved a constitutional challenge to a collective-bargaining agreement between a school board and the teachers' union. The agreement protected teachers who were of certain minority groups against layoffs. The school board defended the race-based policy on the ground that it provided minority students with "role models" and helped to cure general societal discrimination by exposing all students to minority teachers. *Id.* at 275-76 (plurality), 295 (White, J., concurring in judgment). The Court struck down the policy as unconstitutional and, in doing so, rejected the "role model" theory:

> The role model theory allows the Board to engage in discriminatory hiring and layoff practices long past the point required by any legitimate remedial purpose.... Carried to its logical extreme, the idea that black students are better off with black teachers could lead to the very system the Court rejected in *Brown v. Board of Education*, 347 U.S. 483 (1954).

Wygant, 476 U.S. at 275-76 (plurality).

Like the school board in *Wygant*, the District in this case justifies its race-based assignment plan on questionable grounds that allow it to engage in discrimination into the indefinite future. Even if the goals of improving race relations or creating networking opportunities were desirable, the District fails to explain how these goals rise to the level of "compelling" state interests in the context of K-12 public education that can justify racial discrimination against children. Neither the District nor the Ninth Circuit offers any authority or evidence supporting the assumption that it is the mission of K-12 public schools to improve race relations, eliminate prejudices, or create opportunity networks. Moreover, the unproven assumptions behind the District's rationale (which the Ninth Circuit does not question) are quintessentially stereotypical: *Because of race*, there is an inherent antagonism between white and nonwhite

children, and nonwhite children have no access to networking opportunities.

Similarly stereotypical—and even racist—is the District's assumption that nonwhite children are poor and academically inadequate simply because they do not learn alongside white children. In *Missouri v. Jenkins*, 515 U.S. 70, 122 (1995) (Thomas, J., concurring), Justice Thomas said:

> [I]f separation itself is a harm, and if integration therefore is the only way that blacks can receive a proper education, then there must be something inferior about blacks. Under this theory, segregation injures blacks because blacks, when left on their own, cannot achieve. To my way of thinking, that conclusion is the result of a jurisprudence based upon a theory of black inferiority.

See also David J. Armor, *The End of School Desegregation and the Achievement Gap*, 28 Hastings Const. L.Q. 629, 653 (2001) (finding no correlation between racial isolation and academic performance); *see also Grutter*, 539 U.S. at 364-65 (Thomas, J., dissenting) (identifying research that shows that black students perform better at historically black colleges than at racially balanced ones). Furthermore, neither the District nor the Ninth Circuit show a necessary correlation between the racial makeup of a school and the cited societal ills. At most, one can only conclude that socioeconomic forces—not race—drive the levels of poverty, achievement, and quality of teachers and classes at any given school. But even a socioeconomic explanation for nonwhite achievement and the levels of school resources have been questioned. *See* Armor, *supra*, at 653.

Like the "role model" theory, the District's theory fails as a compelling state interest, because affording it such recognition would allow the District and other school districts across the country to racially discriminate "long past the point required by any legitimate purpose" and gives undue credence

to the long-dispelled notion that the skin color of a student's classmates determines the student's capacity to socialize and learn.

The *Grutter* Court did not overrule *Wygant*. Nor did the Court overrule any of its other decisions in which it struck down race-based schemes designed to cure general societal discrimination and other ills. *See, e.g.*, *Shaw*, 517 U.S. at 909-10 (striking down racial gerrymandering scheme created to "alleviate the effects of societal discrimination"); *Croson*, 488 U.S. at 511 (plurality) (striking down racial quotas in public contracting in the absence of findings of past discrimination); *Bakke*, 438 U.S. at 310 (Powell, J.) (rejecting a race-based policy created to improve "the delivery of health-care services to communities currently underserved"). And since its decision in *Grutter*, the Court has reaffirmed its commitment to "smoking out" all illegitimate uses of race, making it clear that *Grutter* does not supply government entities with a blanket exception to the Equal Protection Clause. *Johnson*, 543 U.S. at 506. To accept the theory that *Grutter*'s "educational benefits" exception applies in all areas of government activity, including K-12 public education, is to ignore this Court's precedents both before and after *Grutter*.

C. There Should Be No "Social Science" Exception to the Equal Protection Clause

The Ninth Circuit relied upon the District's "expert testimony" and "[a]cademic research" allegedly showing that racially balanced schools produce some (uncertain) level of benefits for students, including "improved critical thinking skills," "socialization and citizenship advantages," and "opportunity networks in areas of higher education and employment." *PICS*, 426 F.3d at 1174-77. The Ninth Circuit also considered "research" presented by the District that "racially concentrated or isolated schools are characterized by much higher levels of poverty, lower average test scores, lower

levels of student achievement, with less qualified teachers and fewer advanced courses." *Id.* at 1177. This Court should make clear that, because of its inherent unreliability, such social-science research cannot justify exceptions to the Equal Protection Clause.

The use of social science evidence to support the development of the law has been highly criticized because it is value laden and litigation driven. For example, although there was universal approval of *Brown*'s desegregation mandate, this Court's reliance on psychological findings to support its ruling was immediately attacked because such findings can be so easily revised or repudiated:

> Today the social psychologists . . . are liberal and egalitarian in [their] basic approach. Suppose a generation hence, some of their successors were to revert to the ethnic mysticism of the very recent past; suppose they were to present us with a collection of racist notions and label them "science." What then would be the state of our constitutional rights?

Edmund Cahn, *Jurisprudence*, 30 N.Y.U. L. Rev. 150, 167 (1955); Angelo N. Ancheta, *Civil Rights, Education Research, and the Courts*, Educational Researcher, Jan.-Feb. 2006 at 26. *Brown* was correctly decided, not because of the plaintiffs' persuasive social-science research, but because race-based segregation plainly violates the mandate of the Equal Protection Clause.

Professor Ancheta recognizes that social-science evidence rests on an uncertain footing in civil rights and other forms of litigation for a number of reasons. *See* Ancheta, *supra*, at 27. First, "law and science operate through highly dissimilar institutions and processes, with significantly different vocabularies, methodologies, and cultures that do not readily lead to clear paths for judges, litigators, or expert witnesses to follow." *Id.* Second, courts lack the expertise necessary to

interpret social-science evidence or statistical methods. This lack of knowledge may cause courts to avoid deeper inquiries on important debates about scientific knowledge. *Id.* Third, the screening of social science research is virtually nonexistent, so "weak or bad science" has been used to formulate public policy and create broad legal principles. *Id.*; *see also* Robert Lerner & Althea K. Nagai, *A Critique of the Expert Report of Patricia Gurin in Gratz v. Bollinger*; Dr. Thomas E. Wood & Dr. Malcolm J. Sherman, *Race and Higher Education* (2001) (same).

The Justices of this Court have recognized the inherent lack of reliability of social-science evidence. In *Grutter*, Justice Thomas cited research showing that, contrary to the conclusions drawn from the law school's social-science evidence, greater racial diversity on college campuses actually "hinders students' perception of academic quality." *Grutter*, 539 U.S. at 364 (Thomas, J., dissenting). Justice Thomas went on to criticize the majority for ignoring research on students at historically black colleges and universities that indicated that racial heterogeneity could impair learning among black students. *Id.* For every item of social-science research tending to prove one proposition, there is another item of social-science research tending to prove the opposite.

This Court should make clear that no social-science exception to the Equal Protection Clause exists. If the Court does not prohibit the use of social-science evidence here, the floodgates will be opened to any and all claims of a compelling state interest based on so-called social-science evidence. No social scientist can show that education is possible only in racially balanced classrooms, but any social scientist can produce research to support some claim about some level of benefits derived from "diversity." Courts are not in the best position to critically analyze such evidence. Nonremedial racial discrimination should be limited to social emergencies, and where there is overwhelming and essentially incontrovertible

evidence that using race will produce immediate, tangible, and weighty benefits that will be irretrievably lost otherwise.

III

THE PLAN IS NOT NARROWLY TAILORED TO ACHIEVE THE DISTRICT'S STATED GOAL OF DIVERSITY

A. The District's Race-Balancing Plan Fails to Provide Individual, Holistic Review of Students

When racial balancing becomes a permissible government objective, few of the narrow tailoring requirements of strict scrutiny can be followed in any meaningful way. If racial balance is a permissible goal, there is no need for individualized consideration of applicants or consideration of other ways in which students can contribute to diversity. Race becomes the decisive factor and is used in the mechanical, nonindividualized manner rejected in *Grutter*. *Grutter*, 539 U.S. at 337 ("The importance of this individualized consideration in the context of a race-conscious admissions program is paramount."). Moreover, when race is not the means to an end but the end itself, we have "discrimination for its own sake," *Bakke*, 438 U.S. at 307 (Powell, J., concurring), and there is no compelling interest, *Grutter*, 539 U.S. 330 ("[O]utright racial balancing . . . is patently unconstitutional."). This does not prove that narrow tailoring is no longer relevant; it proves that there is something wrong with the compelling interest that has been asserted.

The Ninth Circuit erroneously relied on this Court's endorsement of numerical goals aimed at achieving a "critical mass" of different racial groups in order to conclude that the District's 15% cap on racial imbalance is narrowly tailored. The court failed to recognize that "[c]ontext matters." *Grutter*, 539 U.S. at 307. The law school's admissions policy upheld in *Grutter* was vastly different from the District's assignment plan

in this case. In *Grutter*, this Court observed that "[t]he law school engages in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment and that "[t]here is no policy, either *de jure* or *de facto*, of automatic acceptance or rejection based on any single 'soft' variable." *Grutter*, 539 U.S. at 309. The law school program "awards no mechanical, predetermined diversity 'bonuses' based on race or ethnicity." *Id.* at 337. The program "adequately ensures that all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions" and does not "limit in any way the broad range of qualities and experiences that may be considered valuable contributions to student body diversity." *Id.* at 337-38. The law school "seriously considers each 'applicant's promise of making a notable contribution to the class by way of a particular strength, attainment, or characteristic—e.g., an unusual intellectual achievement, employment experience, nonacademic performance, or personal background.'" *Id.* at 338. Further, the law school plan "gives substantial weight to diversity factors besides race." *Id.* In sum, the law school plan "seriously weighs many other diversity factors besides race that can make a real and dispositive difference for nonminority applicants as well. By this flexible approach, the Law School sufficiently takes into account, in practice as well as in theory, a wide variety of characteristics besides race and ethnicity that contribute to a diverse student body." *Id.* at 338-39.

In this case, the plan's racial "tiebreaker" operates as a quota to achieve and maintain a predetermined ratio of white to nonwhite students in the public schools.[3] *PICS*, 426 F.3d

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[3] The use of race has a negligible effect on racial balance at the high schools—i.e., the use of race does not really further the District's stated goal of racial diversity. The District suspended its use of race

(continued...)

at 1169-70. Its sole function is to prevent any school from deviating by more than a preset number of percentage points from the District's preferred ratio of white to nonwhite students. *Id.* As the First Circuit recognized in *Wessmann v. Gittens*, 160 F.3d 790, 799 (1st Cir. 1998), "[t]he [Plan] is, at bottom, a mechanism for racial balancing—and placing our imprimatur on racial balancing risks setting a precedent that is both dangerous to our democratic ideals and almost always constitutionally forbidden." In *Eisenberg v. Montgomery County Pub. Sch.*, 197 F.3d 123 (4th Cir. 1999), the Fourth Circuit addressed whether a school district may deny a student's request to transfer to a magnet school because of his race. In finding that the use of race was not narrowly tailored, the appeals court found:

> In fact, we find that it is mere racial balancing in a pure form, even at its inception . . . . The transfer policy is administered with an end toward maintaining this percentage of racial balance in each school. This is, by definition, racial balancing . . . . Although the transfer policy does not necessarily apply "hard and fast quotas," its goal of keeping

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[3] (...continued)
following the Ninth Circuit's initial injunction in April, 2002. Following that suspension, the popular high schools continued to enroll substantial numbers of both white and nonwhite students: about 59.4% white and 40.6% nonwhite at Ballard, 18.4% white and 81.6% nonwhite at Franklin, 61.5% white and 38.5% nonwhite at Nathan Hale, and 56.8% white and 43.2% nonwhite at Roosevelt. *See* Seattle Public Schools Enrollment Count, Ethnic Distribution October 2002, https://www.seattleschools.org/area/siso/enroll/past/p105/oct02.pdf (last visited Aug. 15, 2006). Amici request that this Court take judicial notice of this data, because it is "not subject to reasonable dispute" as the data is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201.

> certain percentages of racial/ethnic groups within each school to ensure diversity is racial balancing.

197 F.3d at 131 (citation and footnotes omitted).

The District's plan provides none of the individualized considerations essential to the Court's approval of the use of race by the law school in *Grutter*. The District has not demonstrated how its racial "tiebreaker" gives each K-12 student "a highly individualized, holistic review" when its purpose is simply to ensure that each school has a student body that does not deviate by more than 15% from the racial makeup of the students in the District as a whole. Nor can it. It is challenging enough to determine the extent to which a young adult can contribute to the "diversity" (however that term might be defined by officials) of a law school class. It is absurd to presume the ability to make such a determination for students in the context of K-12 public schools. Instead of conducting a thorough examination of relevant individual characteristics, schools would likely resort to race as a proxy for "the diversity that furthers a compelling state interest [which] encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." J. Kevin Jenkins, *Grutter, Diversity, and Public K-12 Schools*, 182 Educ. Law. Rep. 353, 368 (2004).

The plan in this case demands nothing more than proportional representation by pigmentation to achieve the school district's preferred racial mix of students. This racial balancing is constitutionally forbidden. *Gratz*, *Grutter*, and *Bakke* compel the conclusion that narrowly tailoring a racial preference program at the K-12 level is impossible.

B. School Districts Remain Free to Address Racially Imbalanced Schools and Improve Education Through Race-Neutral Means

Even in *Grutter*, the Court recognized the requirement of engaging in a "serious, good faith consideration of workable race-neutral alternatives." *Grutter*, 539 U.S. at 339. In *PICS*, the court failed to take the school district to task for not evaluating race-neutral alternatives. *PICS*, 426 F.3d at 1215 (Bea, J., dissenting). In dissent, Judge Bea observed that the District "flatly admitted [it] did not engage in a serious, good-faith consideration of race-neutral alternatives." *Id.* at 1214. This, in spite of the fact that there are numerous race-neutral alternatives available to school districts to achieve the benefits of student body diversity. *See, e.g.*, U.S. Dep't of Educ., Office for Civil Rights, *Achieving Diversity: Race-Neutral Alternatives in American Education* (2004) (identifying numerous "innovative 'race-neutral' alternatives" to achieve student body diversity, while avoiding the sort of blatantly race-conscious policies adopted by the District in this case).

First, districts can reform the system so that parents have more choice as to where to send their children to school. For example, reform can take the form of charter schools or vouchers. "Increased choice creates a competitive environment that forces schools to compete for students. Thus, increased school choice should produce new and innovative schools, including those that are particularly effective at responding to the educational needs of low-income, urban, minority students." Kevin Brown, *The Supreme Court's Role in the Growing School Choice Movement*, 67 Ohio St. L.J. 37, 41 (2006).

Second, districts can create magnet schools that offer specialized programs that attract diverse groups of students. As a California appeals court has explained: "Magnet schools have the advantage of encouraging voluntary movement of students

within a school district in a pattern that aids desegregation on a voluntary basis." *Crawford v. Huntington Beach Union High Sch. Dist.*, 121 Cal. Rptr. 2d 96, 104 (Cal. Ct. App. 2002) (internal citation and quotation marks omitted); *see also Hernandez v. Bd. of Educ. of Stockton Unified Sch. Dist.*, 25 Cal. Rptr. 3d 1, 4-5 (Cal. Ct. App. 2004) (describing a school district's "race neutral" magnet program for achieving racial diversity).

Third, districts can assign students on the basis of a random lottery system. *Crawford*, 121 Cal. Rptr. 2d at 104 ("Another version of an 'integration plan' described is a program which would assign only a very small geographic area for a student's home school, and fill remaining places in that school's class by an unweighted random lottery."). A lottery can be tailored to fit a school district's particular race-neutral diversity need. For example, if an applicant pool for a given school is not representative, the school district might use "a weighted lottery, which gives added weight (i.e., an extra lottery number or two) to applicants who represent characteristics sought in the enrollment mix." U.S. Dep't of Educ., Office of Innovation & Improvement, *Innovations in Education: Creating Successful Magnet Schools Programs* 4 (2004) (emphasis added).

C. California's Proposition 209 Provides All K-12 Public School Students Equal Education Opportunities Without Using Race-Based Assignment Plans

If the goal of race-based assignment policies in K-12 public schools is to improve the academic performance of minority children, then California has proven that the goal can be achieved through race-neutral means. For the last ten years, California school districts have been required to provide equal educational opportunities to its K-12 public school students without using race-based assignment policies. *See, e.g.*,

Crawford, 121 Cal. Rptr. 2d at 104-05 (striking down race-based assignment policy used to achieve racial balance). This is because the California Constitution *prohibits* the very kind of race-based assignment at issue in this case. Cal. Const. art. I, § 31(a).

On November 5, 1996, the people of the State of California approved the California Civil Rights Initiative (Proposition 209), which amended the California Constitution by adding Article I, Section 31. Section 31 provides that "[t]he state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."

By its own terms, Section 31 extends to school districts. Cal. Const. art. I, § 31(f) ("For the purposes of this section, 'State' shall include . . . any . . . school district . . . ."). Moreover, Section 31 applies to race-balancing plans, like the one at issue here. *Crawford*, 121 Cal. Rptr. 2d at 102-03. In adopting Proposition 209, the voters made it clear that Section 31 does not permit the use of race for any reason whatsoever:

> Unlike the equal protection clause, section 31 categorically prohibits discrimination and preferential treatment. Its literal language admits no "compelling state interest" exception; we find nothing to suggest the voters intended to include one sub silentio.

Hi-Voltage Wire Works, Inc. v. City of San Jose, 12 P.3d 1068, 1087 (Cal. 2000).

One of the goals of Proposition 209 was to "address inequality of opportunity . . . by making sure that *all* California children are provided with the tools to compete in our society." *Id.* at 1083. At the same time, voters understood that

Proposition 209 would "eliminate, or cause fundamental changes to, voluntary desegregation programs run by school districts." *Id.* at 1098 (George, C.J., concurring in part and dissenting in part). The Legislative Analyst estimated "that up to $60 million of state and local funds spent each year on voluntary desegregation programs may be affected." *Id.* at 1107 (appendix). These were funds that could be spent on other public school programs, such as outreach programs for K-12 students considering colleges.

In the wake of Proposition 209's passage, the League of California Cities made recommendations to school districts, including developing academic support programs and financial aid services for students from low-income backgrounds. Eryn Hadley, *Note, Did the Sky Really Fall? Ten Years After California's Proposition 209*, 20 B.Y.U. J. Pub. L. 103, 131 (2005) (citing League of California Cities report). For example, the UC Links program offered by the University of California prepares K-12 students from low-income families for college—regardless of their race. Hadley, *supra* (citing UC Links, *University-Community Links*, https://www.uclinks.org (last visited Aug. 15, 2006)). The UC Links program describes its goal as follows:

> UC Links serves students starting at the early stages of the academic pipeline. UC Links largely serves students at the elementary and middle school levels, and sets them early on a college-going path through engaging learning activities.
>
> UC Links is inclusive, supporting children who are struggling in school, as well as those who do well. While many educational programs serve students who are already doing well in school, UC Links programs are open to all children and youth in the host school or community. By giving youth from low-income or language-minority communities extra

> support early in their school careers, UC Links enables them to overcome obstacles they face to their academic development.

See UC Links, *UC Links: A Summary*, http://www.uclinks.org/what/what_home.html (follow "summary" hyperlink). According to UC Links, the program has been successful at improving the academic performance of students participating in it: "Evaluation results for students participating in UC Links programs indicate improved basic literacy, greater information literacy, improved collaborative behavior and attitudes, and increased aspirations for higher learning." UC Links, *University-Community Links: Building a Pathway to Higher Education Through Informal Learning Activities*, http://www.uclinks.org/what/what_home.html (follow "overview" hyperlink).

The achievement of students in California K-12 schools has not suffered from the unavailability of race-based policies. Quite the contrary, academic achievement has improved since Proposition 209 banned the use of race-based policies. As Eryn Hadley reports: "[T]he graduation rates of California's high school students steadily increased after the passage of Proposition 209" *in every ethnic group*. Hadley, *supra*, at 132. Citing California Department of Education statistics, Ms. Hadley goes on to explain:

> [T]he California High School completion rate reached a low point of 64% during the 1994-95 year (the year before Proposition 209 was adopted), after dropping from 68.6% in 1991-92. In the following years, the high school graduation rate crept back up to 69.6% in 2001-02. A report based on data from the California Department of Education shows that the graduation rate of all minority students increased in each ethnic group between the years 1995-96 and 2001-02. The low percentage of students that

> graduate with a high school diploma is discouraging, but it requires providing all students with the tools they need, regardless of race or sex.

Hadley, *supra*, at 132.

Moreover, minority high school students in California have outperformed minority high schools students nationally. This is the case even though California has a constitutional provision banning school districts from using race to shuffle around students in the name of "diversity." As Ms. Hadley reports:

> The graduation rates of California's minority students were above the national average in 2001. In California, 82.0% of Asian students graduated in 2001, compared to 76.8% of Asian students nationally. Fifty-seven percent of Hispanic students in California graduated in 2001, compared to 53.2% nationally. California's black students beat the national graduation rate by 5.1% in 2001, with 55.3% of California's black students graduating from high school.

Hadley, *supra*, at 133.

The way to increasing academic achievement among minority students in K-12—if that is indeed the goal of the District and other school districts in the country—is *not* to implement race-balancing policies. Instead, the answer is to implement race-neutral programs that have a proven track record. It is the responsibility of elected local school boards to ensure that every child has a genuine opportunity to receive an excellent education no matter what school he or she attends, and no matter what his or her race happens to be.

CONCLUSION

By discounting equal protection, Seattle's public schools are sending the wrong message to its children—that racial discrimination is more important than individual rights and liberties in today's society. The central question before this Court is whether the Constitution permits this result. Amici respectfully urge this Court to adopt a bright line rule that race should play no role in assigning students to public elementary and secondary schools, that *Grutter* is limited to its facts, and overturn the decision below.

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Respectfully submitted,

PAUL J. BEARD II
Of Counsel
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

SHARON L. BROWNE
Counsel of Record
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Counsel for Amici Curiae
Pacific Legal Foundation, American Civil Rights Institute,
Center for Equal Opportunity, American Civil Rights Union,
and National Association of Neighborhood Schools